

CAUSE NO. D-1-6V-09-002284

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT,
On behalf of the Public Interest in Charity.
Plaintiff,

v.

THE HEALTH CARE
FOUNDATION, INC., d/b/a
OSTEOPATHIC HEALTH FOUNDATION
Defendant.

IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

345 JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

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At Amalia Rodriguez-Mendoza, Clerk

ATTORNEY GENERAL'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, The Attorney General of the State of Texas (the "Attorney General" hereafter), by and through the undersigned Assistant Attorney General, on behalf of the interest in charity of the general public of the State of Texas, files this Original Petition to protect the public interest in the administration of the charitable assets held for the benefit of the public by The Health Care Foundation, Inc., d/b/a Osteopathic Health Foundation ("the Foundation" or "Defendant" hereafter) and would show unto the Court as follows:

I.

DISCOVERY PLAN

1. Plaintiff requests that discovery be conducted pursuant to Level 2 of Rule 190 of the Texas Rules of Civil Procedure.

II.

AUTHORITY

2. The Attorney General brings this suit acting within the scope of his duty and authority under the common law to protect the public interest in public funds held in public charitable trusts.

3. This suit is also brought by the Attorney General pursuant to the authority granted him under Chapter 123 of the Texas Property Code, the Texas Non-Profit Corporation Act, the Texas Miscellaneous Corporation Laws Act, and the Texas Constitution. *See* Tex. Prop. Code Ann. ch. 123 (Vernon 1995 & Supp. 2002); Tex. Rev. Civ. Stat. Ann. art. 1396-1.01 *et seq.* (Vernon 1997) now known as the Texas Business Organizations Code §§22.01-23.110; Tex. Rev. Civ. Stat. Ann. art. 1302-1.01 *et seq.* (Vernon 1997) (“MCLA”); and Tex. Const. Article IV, §22.

PUBLIC INTEREST

4. The general public of the State of Texas has an interest in the administration of assets dedicated for charitable purposes. As the public’s representative, the Attorney General has the right and duty to seek an accounting of the use of such funds held by charitable entities. The managers/fiduciaries of such charitable entities are responsible for ensuring that funds so dedicated are used for a proper purpose pursuant to their fiduciary duties to administer and account for the funds for the charitable benefit of the public in compliance with law. As a result, it is the Attorney General’s belief that these proceedings are in the interest of the public of this State.

III.

JURISDICTION AND VENUE

5. Jurisdiction in this Court is proper under §115.001 of the Texas Property (Trust) Code, and venue is proper in Travis County under §123.005(a) of the Texas Property (Trust) Code.

IV.

PARTIES

PLAINTIFF:

6. The Attorney General of the State of Texas is the Plaintiff and can be served for all purposes in this matter through his Consumer Protection and Public Health Division located at 300 West 15th Street, 9th Floor, Austin, Texas 78701.

DEFENDANT:

7. **THE HEALTH CARE FOUNDATION, INC.** is a Texas non-profit corporation, a common law charity, an Internal Revenue Code §501(c)(3) "charitable organization," and a §509(a)(1) "supporting foundation." Since 1991, the Foundation has been doing business as the Osteopathic Health Foundation with its principal place of business at 3715 Camp Bowie Blvd., Fort Worth, Texas 76107. The Foundation has agreed to accept service through its attorney, Joseph Postnikoff, by certified mail. The Attorney General reserves the right to name former specific officers, directors, and employees of the Foundation and related entities.

V.

INTRODUCTION

8. The Attorney General seeks recovery of damages and equitable relief for various acts, errors, and omissions by Defendant that contributed to the closing of the Fort Worth Osteopathic Hospital. The Foundation is also believed liable for aiding and abetting breaches of fiduciary duties, causing harm to the public's interest in the charitable hospital and resulting in damages to the charitable public of Texas.

VI.

BACKGROUND

THE FOUNDATION AND RELATED ENTITIES

9. Fort Worth Osteopathic Hospital, d/b/a Osteopathic Medical Center of Texas ("FWOH"), was founded in Fort Worth, Texas in the 1940's. For over fifty years it served the medical needs of the Fort Worth community as an osteopathic hospital. Before it closed its doors in 2004, FWOH was the only remaining osteopathic hospital in the State of Texas.

10. In 1984, Health Care of Texas, Inc. ("HCT") was incorporated as the parent organization of FWOH. Both FWOH and HCT were incorporated as organizations exempt from federal income taxation pursuant to the IRS Code, §501(c)(3) of Title 26 U.S.C., The Internal Revenue Code.

11. In 1986, The Health Care Foundation Inc., Defendant herein, was incorporated as a Texas non-profit corporation pursuant to the IRS Code of 1954, §§501(c)(3) and 509(a)(1). Over the last several years, FWOH expanded its operations, notwithstanding increased debt, into areas unrelated to the practice of osteopathic medicine and made financial decisions inconsistent with the core mission of the organizations. FWOH and HCT ultimately ceased operations, and on

February 11, 2005, commenced voluntary Chapter 7 (liquidation) petitions under the U.S. Bankruptcy Code.

12. Both FWOH and HCT remain Debtors in case numbers 05-41513-dml7 and 05-41503-dml7 now pending in the U.S. Bankruptcy Court for the Northern District of Texas - Ft Worth Division. The Foundation did not file Bankruptcy, and as a nonprofit corporation, is not subject to an involuntary petition (11 USC 303(a)).

13. The Foundation represents that it is operated exclusively for charitable purposes by conducting or supporting activities that benefit or carry out the purposes of FWOH. Although FWOH and HCT are no longer operating, the Foundation has continued to operate on a limited basis, allegedly in order to liquidate remaining assets and resolve financial obligations owed its creditors.

MISLEADING ACCOUNTING PRACTICES

14. At all relevant times, the Chief Financial Officer ("CFO") for HCT was also the CFO for FWOH, which created conflicts of interest.

15. FWOH's uncertain financial condition was hidden by improperly accounting for the true value of the hospital's accounts receivable. Certain officers and employees of HCT and FWOH improperly accounted for FWOH's accounts receivable. Accounts receivable that had been written-off as bad debts were reinstated on FWOH's balance sheet to improve financial reports. The Foundation, as a supporting organization, knew or should have known of these improper practices and should have taken steps to remedy them.

OVERLAPPING BOARD MEMBERS

16. The Foundation, HCT, and FWOH maintained overlapping board members, which created conflicts of interest. As a result, the officers and directors of the Foundation either directly or indirectly participated in these improper accounting practices or did not properly monitor HCT's

and FWOH's financial situation. Had the Foundation fulfilled its duties to oversee the financial condition of these charities, bankruptcy of the hospital could have been avoided.

IMPROPER TRANSFERS OF REAL PROPERTY AND LOANS BETWEEN CHARITIES

17. Officers of HCT and FWOH transferred real estate and made loans between the subsidiaries and affiliates of HCT, including but not limited to the Foundation. Upon information and belief, such transfers were made in a manner that breached fiduciary duties owed to the public.

THE LIFE PROGRAM

18. The LIFE Program appears to have been an unsuccessful program to raise money for the Foundation's endowment fund by financing the purchase of life insurance policies on certain qualifying directors, officers, and employees of FWOH, as well as family members of certain directors and officers who opted to participate in the LIFE Program. Members of the Board of Directors of the Foundation either approved of or acquiesced to participating in the LIFE Program. In consideration for their participation in the LIFE Program, each person upon whose life an insurance policy was purchased received \$25,000 in life insurance coverage. It is believed that several of the directors and officers of the Foundation, and in some cases members of their families, received this life insurance coverage at the expense of FWOH and the Foundation. Funds from the Foundation were used in part to initiate and maintain this unsuccessful program. Each time expenditures were approved to maintain this unsuccessful program, the directors and officers of the Foundation improperly approved a benefit to themselves and/or their families.

19. Furthermore, upon information and belief, certain of the Foundation officers and/or directors also had a business relationship with the agents or brokers that sold the insurance policies to the Foundation, which created conflicts of interest.

20. An independent study of the LIFE Program conducted in 2003 showed that updated actuarial tables made the LIFE Program projections unattainable. It is believed that if this information had been reviewed by the Foundation at the time the LIFE Program was first proposed, the Foundation and related charities would have avoided losses.

VII.

BREACH OF FIDUCIARY DUTIES

21. As alleged above, Defendant has breached fiduciary duties by and through its directors and officers, and/or its knowing or negligent third-party employees. Such acts by Defendant violate the common law and statutory laws of the State of Texas pertaining to nonprofit corporations and charitable organizations. The Foundation holds its assets in trust for the benefit of the public and for the charitable purposes for which the Foundation is dedicated. Defendant thereby owes fiduciary duties to the citizens of the State of Texas, as well as to the Foundation itself, to use the Foundation's assets for its intended purpose. Based upon the common law charitable trust fiduciary duties, the Defendant is liable to the citizens of Texas for, among other things, compensatory damages in the amount of any dispensation of the Foundation's assets over and above amounts determined to be reasonable compensation for services rendered.

VIOLATION OF THE TEXAS NON-PROFIT CORPORATION ACT:

22. Defendant, as alleged above, has, through collective acts and omissions, violated the fiduciary duties imposed on directors, officers, and/or knowing third-parties, to use the Foundation's assets solely for the purpose or purposes of the corporation as expressed in its

articles of incorporation by failing to properly manage corporate assets and failing to act in good faith, with ordinary care, and in a manner that the directors and officers reasonably believe to be in the best interest of the non-profit corporation, as set-out in Art.1396-2.01; 2.20(E); 2.22; 2.23; 2.23A; 2.26; 2.28; and 2.30 of the Texas Non-Profit Corporation Act.

VIII.

REMEDIES SOUGHT

ACCOUNTING AND CY PRES

23. The Foundation's assets, after an accounting of such assets, should be ordered released to this Court to be distributed pursuant to the doctrine of cy pres, wherein the court orders the funds to a charitable entity or entities that fulfill a similar mission as the Fort Worth Osteopathic Hospital did in the Fort Worth community. Likewise, any and all funds disgorged should be turned over to the Court for the charitable benefit of the public of Texas.

MONETARY RELIEF

24. Upon information and belief, Defendant, by and through its officers and directors, has violated fiduciary duties as described above, and Defendant should be ordered to pay for the benefit of a similarly situated charitable foundation all amounts held to be unreasonably wasted and all interest that has accrued thereon. Defendant should also be ordered to pay for all additional damages caused by the lost use of the subject charitable assets (the decrease in the Foundation's principal and the earnings lost therefrom). Further, Defendant should be found liable for any and all other civil penalties and all actual and exemplary damages, including all pre-judgment and post-judgment interest on all awards of damages, civil penalties, and other recoveries as provided by law, to which the Attorney General, on behalf of the public interest in charity, may show himself entitled.

V.

REQUEST FOR TRIAL BY JURY

25. The Attorney General hereby requests a jury trial.

VI.

AWARD OF ATTORNEYS' FEES AND COSTS

26. The Attorney General requests the recovery from Defendant of all costs incurred in bringing this suit, including attorneys' fees, investigative costs, and costs of court pursuant to §402.006(c) of the Texas Government Code and §§114.064 and 123.005(b) of the Texas Property Code.

VII.

REQUEST FOR RELIEF

WHEREFORE, the Attorney General prays that:

A. This Court enter an Order requiring Defendant to make a full and complete accounting to the Attorney General of all funds and assets held by the Foundation and all funds and assets paid by the Foundation for services rendered or for any other reason, the costs of which are to be assessed against the Defendant;

B. This Court declare that the Defendant, through its officers and directors, has violated fiduciary duties to the subject charitable Foundation.

C. The Court, within its equity powers, cy pres all remaining assets of the Foundation to a similarly situated charitable Foundation.

D. The Court render a judgment against the Defendant, in favor of the Attorney General, for and on behalf of the public's interest in charity, with all interest which has accrued thereon;

E. The Court adjudge all costs, taxes, fines, and other civil penalties to which the Attorney General, for and on behalf of the public interest in charity, may show himself entitled against the Foundation;

F. The Court order Defendant to pay the Attorney General's attorneys' fees, all costs incurred in this proceeding, including investigative costs, and costs of court pursuant to §402.006(c) of the Texas Government Code §§114.064 and 123.005(b) of the Texas Property (Trust) Code;

G. The Court order Defendant to pay pre-judgment and post-judgment interest on all awards of damages, civil penalties, and other recoveries as provided by law;

H. The Court order the involuntary dissolution of the Foundation, pursuant to Article 1396-7.01(A)(3) of the Texas Non-Profit Corporation Act; and

I. The Court grant the Attorney General such further relief at law and equity to which he may show himself justly entitled, on behalf of the State of Texas and the interest in charity of the public of this State.

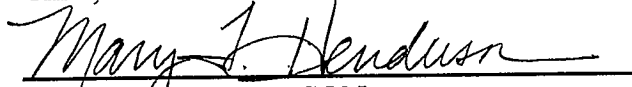
Respectfully submitted,

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ATTORNEYS FOR THE ATTORNEY GENERAL
ON BEHALF OF THE PUBLIC INTEREST IN CHARITY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all lead counsel of record in compliance with Rules 21 and 21a of the Texas Rules of Civil Procedure, on this 21st day of December, 2009, as follows:

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